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Regulatory harmonisation and fragmented enforcement in the Capital Markets Union

Addressing Divergence and Coordinating Diversity

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Abstract

Convergence in regulation and enforcement is a precondition for integrated capital markets. For this reason, strengthened harmonisation of rules and supervisory practices has long been high on the European policy agenda and is now one of the building blocks of the Capital Markets Union (CMU). However, despite this emphasis on convergence, market participants remain often subject to different standards. The reasons for these differences are manifold and include: (i) the uncertain nature of harmonisation and its implications on national systems; (ii) divergent supervisory approaches that result in different interpretations of harmonised rules; (iii) the influence of national civil and commercial codes on courts: (iv) poorly devised conflict of law rules. The paper explores some of the differences among national regulatory and enforcement systems that still hinder the CMU project. It submits that, while some progress can still be made from the regulatory point of view, European policymakers should pay more attention to enforcement. This requires, in more detail, enhanced coordination among national competent authorities (NCAs) and between public and private actors. This conclusion is based on the understanding that some regulatory differences cannot be entirely removed in the short run, but can be better managed. Against this backdrop, rules on coordination of enforcement actions should play a key role in delivering integrated capital markets in the EU.

Keywords:

Capital Markets Union, harmonisation, financial law, supervision, enforcement, conflict of law rules

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I. *EU capital markets integration: a process (still) in the making*

Financial markets integration has long been a high priority on the European agenda. From the very inception of the integration project enshrined in the Treaty of Rome, European policymakers have tried to tackle the barriers to the free circulation of capitals and to the free provision of financial services across the borders, with or without an establishment in the country of destination. The reasons for this integration process are manifold, and all of them contribute to explaining the crucial role of financial services in the European economic context. First, financial services are a market on their own and, therefore, the reduction of transaction costs for their cross-border provision is an efficiency-enhancing strategy just like in any other market. Second, broader capital markets facilitate risk management through diversification and allow firms to tap broader sources of funding. Third, more homogeneous and intertwined capital markets buttress the Economic and Monetary Union (EMU), because this can hardly support a single monetary policy in fragmented financial systems.

Much progress has been made since the early steps of financial markets integration, but it is a widely acknowledged fact that this progress has to date fallen short of delivering truly integrated capital markets in the EU. This paper focuses on the integration process that falls within the scope of the Capital Markets Union (CMU[1]) and considers some of the legal reasons why capital markets still suffer from fragmentation. In particular, it analyses some of the shortcomings that afflict the CMU projects from the point of view of regulatory and supervisory integration. As the analysis will show, some margins still exist to reach a higher level of harmonisation within the CMU. However, even fully harmonised rules on the books are unlikely to lead, on their own, to a truly homogeneous regulatory framework across the EU. This ambitious outcome requires policymakers to pay more attention to supervision and enforcement.

The current shape of the CMU results from the stratification of the regulatory techniques for market integration that have developed over the decades. Since the initial anti-discrimination measures in the Treaty of Rome, the integration strategy has progressively fostered home-country control on the basis of mutual recognition and licensure passporting, all buttressed by minimum harmonisation. Contributing to these developments was also a more active role by the CJEU in scrutinising national measures that could restrict market access, even in the absence of discriminations against foreign service providers.[2] Subsequently, the regulatory strategy became more supportive of maximum harmonisation, with a view to ensuring a level playing field beyond national divergencies. Directives have slowly made way for regulations, and multi-level regulatory frameworks have facilitated the adoption of increasingly detailed harmonised rules.

These developments were initially devised by the Committee of Wise Men on the Regulation of European Securities Markets, which led to the adoption of the so-called Lamfalussy procedure. This hierarchically coordinated approach to harmonisation later found a stronger legal basis in the architecture introduced by the Lisbon Treaty, and particularly in the delegated and implementing acts (Articles 290 and 291 TFEU). Delegated acts are non-legislative measures of general application that supplement legislative acts, or even amend them on non-essential elements. Implementing acts are more technical measures that define how market participants shall comply with duties established by legislative acts – the typical example being the definition of templates or standardised messages.

The picture was then completed with the granting of quasi-regulatory powers to the European Supervisory Authorities (ESAs), which were set up in the aftermath of the 2007-8 financial crisis as recommended by the de Larosière report. The toolbox of financial law harmonisation therefore now includes a broad array of instruments. High-level measures set forth the general principles of regulation – and often also quite detailed measures. These measures are further detailed through delegated and implementing acts. Some of these measures are drafted by the Commission (sometimes after receiving technical advice from the relevant ESA), while in other cases the Commission only endorses Regulatory Technical Standards (RTSs), when the legal basis is Art. 290 TFEU, or Implementing Technical Standards (ITSs), when the legal basis is Art. 291 TFEU, prepared by the competent ESAs.

The process has more recently reached its peak with the aim to create a single rulebook that provides maximum and complete harmonisation at all levels of regulation, from the general principles to the technical details. However, despite the regulatory efforts, the CMU is still a process in the making. In particular, the

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[1] See European Commission, *Action Plan on Building a Capital Markets Union* (COM(2015) 468 final) (30 September 2015); Id., A Capital Markets Union for people and businesses – new action plan (COM(2020) 590 final) (24 September 2020).

[2] CJEU, C-384/93, *Alpine Investments / Minister van Financiën*, 10 May 1995.

adoption of a single rulebook does not seem to have delivered perfectly integrated financial markets, as fragmentation among national systems persists.[3] While the preferred equilibrium between unity and diversity in EU legislation is to a large extent a matter of personal preferences, there is little doubt that, for the time being, regulatory and supervisory divergence is widely perceived as an obstacle to the creation of a true CMU.

This paper shows that, while some room remains for further regulatory convergence, many differences among national legal systems are unlikely to disappear in the short run. Some among these differences create inefficiencies, but are the result of national resistance that will realistically remain for quite some time. Others may instead even foster integration and might stand a thorough impact assessment. Therefore, a reasonable policy approach should focus on how to best manage those differences (whether these are efficient or not) through the coordination of the enforcement agents at both public and private level. This requires, in more detail, enhanced coordination among national competent authorities (NCAs) and between public and private actors.

After drawing a distinction between 'divergence' and 'diversity' in national regulatory and supervisory variance (section II), the paper contextualises the impact of such variance on the pursuit of the CMU (section III). It then considers the role of minimum and maximum harmonisation (section IV) and the effect of general principles (or standards) on regulatory integration (section V). The paper later analyses how interpretation can diverge on some key CMU provisions (section VI), which gives public and private enforcement a key role in supporting the CMU (section VII). It then submits some policy recommendations on enforcement coordination (section VIII) before concluding (section IX).

II. *Diversity and divergence*

Before proceeding with the analysis of the legal integration of capital markets in the EU, it is convenient to frame the analytical tools that the rest of the paper will rely upon. As the synthetic overview of the previous section has shown, national variance is not particularly welcome in financial markets.[4] The reason is straightforward: lack of homogeneity comes at a cost. Financial service providers acting on a cross border basis can reduce operating costs if they have access to one set of homogeneous rules and interpretations, because this enables them to rely one single procedure for every service supplied. To be sure, absent complete harmonisation through positive integration, conflict-of-law rules establishing passports that rely on home country control might lead, based on negative integration alone, to a comparable result for those firms. However, this would reduce homogeneity for the recipients of those services, thus leading in certain cases to different levels of protection depending on the country of origin of the provider. For retail investors, ascertaining such a level of protection would require complex investigations of foreign national regimes. But even for professionals, this would require once again the adoption of potentially as many procedures as are the countries of origin of the providers they deal with. Finally, negative integration alone would not address the risk of reverse discrimination for national service providers.

Therefore, unification through a single rulebook, rather than harmonisation, is widely regarded as the ideal tool for financial market integration.[5] While unification tends to replace national laws and therefore makes larger use of regulations, harmonisation relies more extensively on directives. While unification sets national law-making powers aside in certain areas, harmonisation focuses on the results Member States shall achieve and enrols national laws in the integration efforts. Of course, this bipartition should not be overemphasised. On the one hand, directives may be so detailed to remove any material discretion from national implementation. On the other hand, regulations may still rely on national implementing measures in some specific circumstances,[6] and will in any case rely on national enforcement and interpretations. Another key player in ensuring consistent interpretation and application of EU law is, of course, the CJEU. However, as

[3] Luis de Guindos, 'Europe needs a fully-fledged capital markets union – now more than ever' (2 September 2020) The ECB Blog, available at https://www.ecb.europa.eu.
[4] Paul Craig, 'Subsidiarity: a Political and Legal Analysis' (2012) 50 JCMS 72, 75, highlighting that excessive reliance on subsidiarity delivered suboptimal results in EU financial law.
[5] For a taxonomy see Piet Jan Slot, 'Harmonisation' (1996) 21 European Law Review 378, 379; Asen Lefterov, 'The Single Rulebook: legal issues and relevance in the SSM context' (2015) ECB Legal Working Paper Series No 15, available at https://www.ecb.europa.eu.
[6] CJEU, C-403/98, *Monte Arcosu*, 11 January 2001, ECLI:EU:C:2001:6.

sections VII.II and VIII.II demonstrate, the CJEU can do little to reduce divergence when enforcement relies on national contract law.

Against this backdrop, this paper uses the term 'divergence' when referring to persistent variance across Member States that is worth addressing because further harmonisation would lead to net benefits through more homogeneous implementation and enforcement of European financial law. In this case, expanding the single rulebook would result in efficiency gains by reducing transaction costs for cross-border activities. By contrast, 'diversity' will be used to describe areas where the differences among Member State laws and enforcement practices should be regarded as exogenous and, therefore, managed rather than removed. In this case, allowing for some variation and define a clear legal framework to address it is more congruous than unrealistically trying to force homogeneity.

The distinction between divergence and diversity is of course subjective and depends on personal value judgement. Moreover, whether variance qualifies as 'divergence' or 'diversity' may depend on the horizon of the analysis. In the long run, national resistance that make harmonisation impossible may fade away, which can justify harmonisation attempts. However, this taxonomy eases the identifications of cases where inconsistencies may be detrimental, and shall be removed at least in the long run, from cases where they may be considered a positive or, in any event, an inevitable component of the CMU in the short run. In both cases, there is still a lot to improve in EU law, as it appears that the CMU's focus on unification has overshadowed, in the academic and policy debate, the persisting importance of managing the remaining national differences, particularly through proper regulation of negative integration.

III. *Sources of persistent divergence within the CMU: scope of the analysis*

While this paper concentrates on some legal determinants for the lack of a truly integrated market in the Union, there are obviously other reasons for the persisting fragmentation of European capital markets. In an ideal setting, prices of financial assets in the CMU should reflect their risk-adjusted expected returns with little or no country-specific effects. Remaining legal frictions affecting cross-border investments are certainly not the only reason why this is not yet the case within the Union – and not even within the euro area, where the single monetary policy fosters the convergence of interest rates.[7]

Contributing to market fragmentation are also other factors, including persisting macroeconomic imbalances, which other convergence tools such as the budgetary and economic coordination measures address. Moreover, the flexible exemptions in the European bank resolution regime justify some fears that bailouts will still be possible beyond the residual role they have in the Bank Recovery and Resolution Directive and, as the case may be, the Regulation on the Single Resolution Mechanism (Directive 2014/59/EU and Regulation (EU) No 806/2014). This is perceived as a potential conduit for the doom-loop that has affected the stability of some Member States during the last financial crises. In this regard, while there is no doubt that a fully-fledged CMU can support a strong Banking Union (EBU), the reverse is also true.

Besides the fears surrounding macroeconomic imbalances and their effects on cross-border investments, one should also not overlook other elements whose exogenous nature makes them hard to address through regulatory tools, at least in their traditional shapes. These include the well-known problem of home bias, whether determined by bounded rationality or by asymmetric information on systems other than that of the investor's country of origin, possibly due to language barriers, as well.

These and other factors are not directly linked to capital market law and will not therefore be further considered here. The remainder of the paper will instead look at the legal provisions that are either part of the CMU or directly connected to it.

IV. *Maximum and complete harmonisation?*

A traditional source of ineffectiveness that has long affected the regulatory integration EU financial markets is the insufficient or unclear level of harmonisation.

[7] Paul De Grauwe, *Economics of Monetary Union* (OUP 2020), 129, 246.

While other classifications are possible, it is convenient to distinguish the different forms of harmonisation along with two parameters – intensity and scope.[8] The intensity of harmonisation depends on the harmonisation method (e.g. maximum vs minimum), which defines the remaining space for national choices (or the lack thereof) within the scope of application of the European law measures method. Minimum harmonisation allows Member States to adopt national measures that are more restrictive than those set for by the EU provisions. This leeway is subject to the general requirement that more restrictive measures should not infringe the Treaties and, in particular, should not create obstacles to the free provision of financial services (with or without establishment) or to the free movement of capital as specified in Articles 49, 56, and 63 TFEU, respectively. In principle, maximum harmonisation does not leave any margin of manoeuvre to the Member States, instead. Rather, Member States are just required to apply or implement EU rules with no option to make them stricter (let alone softer). The scope of the harmonisation identifies the areas that EU legal acts covers and that are, therefore, subject to some form of pre-emption of national measures. Complete harmonisation prevents Member States from adopting national measures in areas falling into the scope of application of the relevant EU law, while partial harmonisation leaves leeway to intervene in those areas provided that there is no conflict with EU rules. This section shows that some regulatory obstacles to the CMU may stem from the missing qualifications of harmonisation and, in any event, from the residual spaces for minimum harmonisation.[9]

These problems have been repeatedly highlighted in the past[10] but, to be sure, they are becoming less pressing as regulations are gradually replacing directives as the preferential tools for CMU-related legislation. First, even without specific classifications, unification measures enshrined in regulations are less prone to national gold-plating. Direct applicability of EU law rules out any national provision, whether stricter or not, in their same scope of application.[11] Second, national variations are in general only allowed, within regulations, through specific options. This ensures a sufficient level of consistency even in the presence of some local differences. Some examples will suffice to illustrate the point.

For instance, the prospectus exemption regime allows Member States to define the threshold below which public offerings of securities do not require prospectus approval. National discretion is confined to an amount ranging between 1 million and 8 million euros, so that offerings below 1 million cannot be subject to the duty to publish a prospectus,[12] while this duty always applies above the 8-million threshold unless the issuer can take advantage of another exemption (Articles 1(3) and 3(2)(b) Regulation (EU) 2017/1129 – Prospectus Regulation). This way, Member States can calibrate the scope of application of the Prospectus Regulation based on the purchasing power of the currency. The same explanation may apply to national rules that, under the Market Abuse Regulation, set the thresholds for the disclosure of transactions carried out by persons discharging managerial responsibilities in listed companies (Article 19 Regulation (EU) 596/2014 – MAR).

The creation of a single rulebook inevitably reduces the scope of subsidiarity in a substantive sense, together with the minimum harmonisation principle this tends to foster. Rather, the single rulebook relies on the procedural implications of that principle, particularly during impact assessments.[13] Nonetheless, harmonisation

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[8] For a broadly similar classification in the field of securities law see Luca Enriques and Matteo Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan?' in Paul Krüger Andersen and Karsten Engsig Sørensen (eds), *Company Law and Finance* (Tomson-Sweet & Maxwell, 2008), 167, who classify the different dimensions of harmonisation as: (i) substantive v. conflict-of-law; (ii) comprehensive v. partial; (iii) maximum v. minimum; (iv) and mandatory v. optional.

[9] These problems are of course not exclusive to the CMU: see Ton van den Brink, 'Towards an ever clearer division of authority between the European Union and the Member States?' in Ton van den Brink et al (eds), *Sovereignty in the shared legal order of the EU: core values of regulation and enforcement* (Intersentia 2015), 236-7.

[10] See Michel Tison, Financial Market Integration in the post-FSAP era, in Guido Ferrarini and Eddy Wymeersch, Investor Protection in Europe. Regulatory Competition and Harmonization (Oxford, OUP: 2006), …; Carsten Gerner-Beuerle, 'United in diversity: maximum versus minimum harmonization in EU securities regulation' (2012) 7 Capital Markets Law Journal, 317; Benjamin Gröbe, '"Single Rulebook" but Different Implementation? – Financial Regulation in the European Union Member States' (2020), available at https://ecpr.eu (identifying nonhomogeneous implementation of directives as a source of national divergencies).

[11] See also European Commission, *Targeted Consultation on the Supervisory Convergence and the Single Rulebook* (2021), available at https://ec.europa.eu.

[12] Member States may however apply lighter disclosure obligations, subject to a proportionality test (Art 1(3) Prospectus Regulation). Furthermore, issuers remain free to publish a prospectus on a voluntary basis, which they may want to do to take advantage of the ensuing passporting regime and to raise capitals in other Member States (Art. 4 Prospectus Regulation).

[13] Van den Brink (n 9), 229, 231.

through directives remains the integration tool for significant parts of the CMU architecture. Whether this ensures a sufficient level of regulatory homogeneity is questionable, but sometimes the most pressing problem is rather the vague qualifications of the level of harmonisation EU measures are meant to deliver, because this leads to uncertainty.

It is relatively common for EU secondary legislation to omit any classifications concerning the scope and the intensity of the harmonisation it sets forth.[14] Even when the law sheds some light on this matter, the qualification may refer to some provisions only, which leaves the default regime applicable to the rest of the legislative act uncertain. This problem is widespread across EU measures that foster market integration, including those focussing on services,[15] and financial services are no exception. Again, some examples will clarify the point.

The first relevant example comes from the Markets in Financial Instruments Directive (Directive 2014/65/EU – MiFID II). That Directive is unambiguous on the nature and scope of the harmonisation when it addresses conduct-of-business rules for banks and investment firms in the provision of investment services. In this area, the Directive explicitly allows for more restrictive national measures only on an exceptional basis, and only when these are grounded on objective reasons and meet a proportionality test. Moreover, Member States can invoke only specific features in their national markets' structure that may create a risk to investor protection and market integrity (Article 24(12) MiFID II). The procedural lining for the adoption of super-equivalent measures is the duty to notify their content, two months ahead of their entry into force, to the Commission, which provides an opinion.[16]

These rules define a clear framework for the adoption of stricter national measures, but their scope of application does not go beyond conduct-of-business rules. In other areas of MiFID II, such as the requirements for trading venues (including regulated markets) and for the provision of listing and trading services, the limits for additional national measures are less clear.

The Takeover Bid Directive is perhaps the legislative act where the uncertainties concerning the level of harmonisation manifest themself in the most striking form (Directive 2004/25/EC – TBD). Overall, the Directive sets forth some essential rules that harmonise key elements of takeover law, including the offeror's disclosure obligations (Articles 6 and 8), the duties of the target board of directors (Article 9 – bord neutrality or passivity rule), and the destiny of control-enhancing mechanisms such as restrictions on voting rights or multiple vote shares pending an offer as well as, last but not least, the mandatory bid rule (Article 11 – neutralisation or breakthrough rule). National deviations from the default regimes would also appear, at first sight, subject to a detailed regime. In particular, the Directive allows for opt-outs – whether simple or based on reciprocity clauses – from the passivity rule and the breakthrough rule and creates a safeguard for companies that want to adopt EU rules despite different national choices (Article 12). At the same time, the Directive qualifies its own provisions as of minimum harmonisation and specifies that those 'minimum requirements' do not prevent Member States from laying down more stringent rules than those of the Directive (Article 3(2)). However, these quite specific measures are to some extent superseded by a more general statement according to which, with the exception of the Directive's general principles, Member States may provide for any derogation from the (national measures implementing the Directive) 'in order to take account of circumstances determined at national level' (Article 4(5)). This overarching rule makes the level of harmonisation dependent on national discretion, to the detriment of harmonisation.

V. *General provisions in EU law*

There are, however, more substantive reasons why the single rulebook for capital markets may not deliver maximum and complete harmonisation, irrespective of its (in)ability to curb Member State options and of the nature of its components as directives or regulations. One of these reasons is the use of general provisions (or standards) in EU law.

[14] See Slot (n 5), 388; van den Brink (n 9), 237-8.
[15] On the uncertainty concerning Directive 2006/123/EC (EU Services Directive) see Catherine Barnard, 'Unravelling the Services Directive' (2008) 24 Common Market Law Review 323, 367.
[16] These rules seem to take inspiration from the mechanisms provided under Article 114(4), (5) and (6) TFEU, with some material adaptations.

General provisions play an essential role in EU law, just like in any other legal system. Such broad standards are often necessary to fill gaps in the application of more detailed rules, as these may overlook some specific problems that practical cases create. In this regard, general provisions address regulatory incompleteness, which inevitably affects any regulatory system, just like contractual incompleteness is an inescapable feature of private bargaining.

A good example is the duty of investment firms to act in accordance with the best interest of their clients.[17] This duty requires investment service providers to perform their role so that it does not go to the detriment of their counterparty, whose interest they are bound to protect. In the field of investment services, specific rules of conduct specify how investment firms and other providers of investment services shall behave to cater for the interest of their clients. These are very detailed rules that calibrate the level of protection depending on the transactional or fiduciary nature of the service and on the nature of the client involved. Transactional services such as brokerage or order execution require testing the client's ability to understand the level of risk involved, and to issue a warning in case of a negative result (appropriateness test – Article 25(3) Directive 2014/65/EU on markets in financial instruments – MiFID II). Fiduciary services like investment advice or portfolio management also mandate ascertaining the investment objectives and the ability to bear losses, and prevent investment firms from recommending and, respectively, purchasing the financial instruments that do not pass the scrutiny (suitability test – Art. 25(2) MiFID II).

When services are provided to retail investors, these tests always entail thorough scrutiny of the clients' features, while for professional clients investment firms may rely on presumptions concerning the ability to understand the risks involved (for all professional clients; Articles 54(3), par. 1, and 56(1) Regulation (EU) 2017/565) and the ability to bear risks (only for professional clients that are qualified as such by the law; Article 54(3), par. 2, Regulation (EU) 2017/565). For some transactional services, no such tests apply, subject to adequate disclosure, as long as the service is provided upon the client's initiative and concerns non-complex instruments, such as listed shares or bonds (execution-only regime – Article 25(4) MiFID II).[18] This regime facilitates the provision of certain services for which speed is particularly important, such as online trading. In spite of these exemptions, the general duty to act in the client's best interest continues to apply even to execution-only services.[19] This shows how that general provision, just like many others in EU financial law, can perform as a gap-filler in the absence of more detailed provisions. In such context, the principle expands the scope of application of EU law to partially compensate for the waiver of more detailed harmonisation measures.

The duty to act in the client's best interest can also apply to situations that would follow outside regulated activities but nonetheless raise comparable protection needs. That is the case with generic advice that only consists in recommending a type of financial instrument (such as 'shares') rather than a specific financial instrument (such as 'shares of a certain company'). This recommendation would not amount to investment advice for lack of the required precision (Article 4(1)(4) MiFID II) but might still be presented as suitable for the client it addresses, just like it happens with investment advice (Article 9 Regulation (EU) 2017/565). Even more problematic is the situation where such generic advice precedes the provision of actual investment advice, due to the client's inability to tell when the protective regime applies and when it does not. In all these circumstances, the duty to act in the best interest steps in and expands the applicability of EU law beyond the detailed rules of conduct (Recitals 15 and 16 Regulation (EU) 2017/565), and it does so based on a general provision whose interpretation is more likely to vary depending on the national context.

But general standards of conduct may also play a role within the scope of application of more detailed rules. In particular, they can help interpret those detailed rules whenever their guidance is ambiguous or, in any event, leaves room for different outcomes. For instance, the duty to act in the best interest of the client applies to the remuneration of investment firms' staff even if such remuneration is also subject to more detailed rules (Article

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[17] See Luca Enriques and Matteo Gargantini, 'The Overarching Duty to Act in the Best Interest of the Client in MiFID II' in Danny Busch and Guido Ferrarini (eds), *Regulation of the EU Financial Markets* (Oxford: Oxford University Press, 2017), 92.

[18] See ESMA, *Consultation Paper. Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements* (ESMA35-36-2159) (29 January 2021), 6, 15 (indicating Art. 25(4) MiFID II as the legal basis for execution-only services).

[19] An even lighter regime applies to transactional services involving the subset of professional investors which included banks, investment firms and asset managers (eligible counterparties – Article 30 MiFID II), as in this case also the duty to act in accordance with the best interest of the counterparty is waived.

24(10) MiFID II; Articles 30 to 34 Directive – Investment Firms Directive)[20]. By the same token, this and other general provisions may apply on top of detailed conduct of business rules when these are not able, in and of themselves, to always achieve key regulatory objectives such as investor protection.[21]

Irrespective of their specific function as gap-fillers or interpretive criteria, general provisions may lead to divergent enforcement practices at the national level. This is to some extent connected with their very same function, as flexibility is at the same time their added value, in terms of effectiveness, and their drawback, in terms of consistency. Compared to their equivalents in national contractual laws (on which see section VI below), these standards may receive clarification through requests for preliminary rulings brought before the CJEU, which facilitates consistency across the EU. However, the ability of Article 267 TFEU to ensure uniform application of general provisions remains limited, if one considers that only occasionally can divergent views between supervisors and supervised entities reach national courts, first, and the CJEU, then.

VI. *Divergent interpretations at the national level*

General provisions (or standards) leave room for interpretation also from a supervisory perspective, because they grant NCAs a discretion they do not enjoy with more specific rules. Therefore, those provisions facilitate divergent national application of EU rules, even when these are of a maximum harmonisation nature or take the form of regulations.

Cognizant of these consequences, European policymakers often try to detail the implications of general principles, although at the cost of reduced flexibility. Once again, the examples are countless, and this paper will only focus on those where this specification exercise falls short of ensuring uniform interpretation at the national level. For instance, issuers may postpone the publication of inside information they are bound to make public when – among other conditions – the delay is in the legitimate interest of issuers and is not likely to mislead the public (Article 17(4) MAR). Because terms like 'legitimate interest' and 'mislead' are quite generic, the level 1 Regulation delegates ESMA to adopt guidelines to clarify them. This solution has not delivered complete harmonisation, however. Partially because such clarification relies on 'non-exhaustive' and 'indicative' lists of examples (Article 17(11) MAR), how often issuers can resort to delayed publication of inside information remains uncertain. While ESMA seems to consider the remedy to have an exceptional nature,[22] some NCAs seem to allow for more flexibility,[23] possibly to compensate for the persisting concerns related to adopting a single definition of inside information for both insider dealing and disclosure duties.[24]

Sometimes, EU law also sets out standards that are directly addressing how NCAs should carry out their functions. Prospectus publication requires preliminary approval by the pertinent NCA, and EU law specifies the criteria for the scrutiny such authority has to run. The Prospectus Regulation requires NCAs to verify prospectuses' consistency, coherence, and completeness. As these standards lend themselves to different interpretations, specific delegated measures detail how NCAs should apply each of them. For instance, the rule on the scrutiny of comprehensibility lists a series of elements NCAs shall consider when ascertaining whether a retail investor can understand the contents of the document, including repetitions, lack of structure, the use of plain language and of explanations for specific terminology (Article 37 Regulation (EU) 2019/980).

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[20] See in particular Article 30(1)(e), requiring investment firms to have remuneration policies in place that avoid conflicts of interest.

[21] Enriques and Gargantini (n 17).

[22] ESMA, Policy orientations on possible implementing measures under the Market Abuse Regulation. Discussion Paper (ESMA/2013/1649) (14 November 2013), § 304; Id., Guidelines on the Market Abuse Regulation – market soundings and delay of disclosure of inside information. Final Report (ESMA/2016/1130), 13 July 2016, § 52.

[23] Consob, *Adozione delle Linee Guida in materia di "Gestione delle Informazioni privilegiate" e "Raccomandazioni di investimento". Relazione illustrativa* (13 October 2017), 7, available at www.consob.it; Id. *Proposta di adozione di due comunicazioni recanti l'adozione delle Guide Operative "Gestione delle Informazioni privilegiate" e "Raccomandazioni di investimento". Documento di consultazione* (6 April 2017), 5 s., available at www.consob.it (recommending issuers make regular use of the opportunity of delaying publication of inside information).

[24] Technical Expert Stakeholder Group (TESG) on SMEs, *Empowering EU capital markets for SMEs - Making listing cool again. Final Report* (May 2021), 74, available at https://ec.europa.eu; European Commission, *Targeted Consultation – Listing Act: Making Public Capital Markets More Attractive for EU Companies and Facilitating Access to Capital for SMEs* (19 November 2021), 36-7, at https://ec.europa.eu.

Whether these detailed rules can reduce supervisory divergence is, however, debatable. First, they do not seem to address all the possible sources of variance. For instance, it remains unclear if and, in case, based on what documents NCAs should assess the completeness of a draft prospectus by vetting it against other information at their disposal (Article 36).[25] Second, and most importantly, NCAs are expressly allowed to apply additional criteria during their scrutiny whenever investor protection so requires (Article 40). Once again, this flexibility seems necessary to fill possible gaps and prevent unscrupulous offerors from taking advantage of them, to the detriment of investors. However, it also paves the way for different interpretations. It is indeed a well-known fact among scholars and practitioners that prospectus approvals may look quite different when the requests are filed with different NCAs.[26] To some extent, national divergences in the NCA liability regimes may also play a role in this regard, because supervisors that are more easily held accountable for misleading information within prospectuses will understandably try to protect themselves with stricter scrutiny of the documents.[27]

Even legal concepts that are not necessarily 'general' from the point of view of their hierarchical ranking or of their scope of application may nonetheless be open to interpretation because of their open texture, which refers to matters of fact or aspects that are not harmonised. This may easily occur when explicit or implicit references to national laws prevent autonomous interpretation of European measures. For instance, a key definition for the whole CMU is the notion of 'transferable security', which is the core element of the broader concept of 'financial instrument' and, therefore, of investment services and trading venues, as well as of crowdfunding services among the others (Article 4(1)(15), (24), (44), and Section C Annex I MiFID II; Article 2(1)(a) and (m) Regulation (EU) 2020/1503 on European crowdfunding service providers). One of the essential elements of transferable securities is their ability to be negotiated on capital markets, but this may depend on the applicable national laws and on their – sometimes uncertain – interpretations. This is more often the case with some borderline assets such as shares in private limited liability companies and loans.[28]

These and other divergent interpretations at national level reduce the homogeneity of the regulatory environment, which is one of the essential features of the single rulebook as a pillar of the CMU. They may also be an obstacle to the cross-border provision of financial services when, for the reasons we will explore in the following subsections, they lead to conflicting indications by the pertinent NCA and the competent court of jurisdiction.

An example that is particularly apt to illustrate the point relates to the scope of application of the EU regime for investment services to dealing on own account. A remarkable feature of that regime is that the bulk of MiFID II rules of conduct applies to investment services alone, but the MiFID II surprisingly does not provide an overarching definition of 'investment services'. Rather, MiFID II provides a list of activities collectively labelled as 'investment services and activities' (Article 4(1)(2) and Annex I(A)), and then defines each of them without specifying when the investment firm is providing a service or carrying out an activity.

Conceptually, a service may be considered as a series of coordinated actions performed in the interest of a client, while activities are rather carried out with someone who qualifies, from a legal point of view, as a contractual counterparty towards whom the investment firm is not bound by any specific duty of care.[29] The boundary between the two situations may be blurred, however, and uncertainty is particularly pervasive for

[25] ESMA, Guidelines on disclosure requirements under the Prospectus Regulation (ESMA32-382-1138) (4 March 2021) available at https://www.esma.europa.eu.

[26] ESMA, *Peer review of the scrutiny and approval procedures of prospectuses by competent authorities. Peer review report* (ESMA42-111-7170) (21 July 2022), 31-7, available at https://www.esma.europa.eu; Simone Alvaro et al, 'The Prospectus Regulation. The long and winding road' (2020) Consob Quaderni Giuridici Series No 22, 34-8, available at www.consob.it.

[27] For a comparative study see Danny Busch et al (eds), *Liability of Financial Supervisors and Resolution Authorities* (OUP 2022).

[28] Anne Hakvoort, 'Secondary Trading of Crowdfunding Investments' in Pietro Ortolani and Marije Louisse (eds), *The EU Crowdfunding Regulation* (OUP 2021), § 13.45-54; ESMA, *Annex 1 – Legal qualification of crypto-assets – survey to NCAs* (ESMA50-157-1384) (January 2019), part 3, p. 4-11, available at https://www.esma.europa.eu.

[29] For a more detailed analysis see Danny Busch, 'The Future of the Special Duty of Care in the Financial Sector – Perspectives from the Netherlands' (2021) 32 European Business Law Review 473, 487-90. See also, e.g., England and Wales Court of Appeal (Civil Division), *Ehrentreu v IG Index Ltd (Rev 1)* [2018] EWCA Civ 79 (excluding a generalised duty of care among contractual counterparties in financial markets).

dealing on own account.[30] This is normally acknowledged to be an activity, as confirmed by the broad exemption from applicability of MiFID II rules (Article 2(1)(d) MiFID II). However, the exemption does not apply when dealing on own account is provided when executing client orders (Article 2(1)(d)(iv)), as this entails a form of discretion by an investment firm acting on behalf of the client, who relies on that investment firm's ability to get the best possible conditions to the client's benefit (Article 27). In other words, investment services are prone to agency problems, while dealing on own account is not.

Uncertainty about the scope of application of MiFID II originates from the fact that whether an investment firm is acting on behalf of customers, and is therefore executing an order in their interest, also depends on the parties' expectations concerning their respective rights and duties, and on whether the law, as interpreted by NCAs and courts, gives protection to those expectations. In some cases, MiFID II helps clarify the applicable regime. For instance, primary market transactions amounting to direct placement of own products by banks and investment firms always qualify as 'execution of orders on behalf of clients' (Article 4(1)(5) MiFID II; Article 41 Regulation (EU) 2017/565). This provision seems relatively straightforward, although some uncertainties remain concerning its scope of application. Some scholars believe that banks and investment firms are not subject to the regime for order execution when they are merely acting in the primary market in their capacity as issuers without servicing the client.[31] The CJEU seems to have taken a more protective approach when dealing with the matter, to the point that any transaction on primary markets concerning financial instruments issued by a bank or an investment firm shall be regarded as a service.[32] Other interpretations tend to broaden the scope of application of the rule even more, based on the understanding that professional issuance of financial instruments may in and of itself lead to qualify the issuer as an investment firm.[33]

But doubts surrounding the boundaries between investment services and investment activities in connection with dealing on own account can be even more pervasive in the secondary market. Here, the question of whether the firm is acting on behalf of the customer or as a mere contractual counterparty has no direct answer in the law. The matter cannot be addressed here[34] but, for the purpose of this analysis, it is worth mentioning that guidance to the market is not always consistent. For instance, the Commission has traditionally held that every person entering into a transaction with an investment firm should be considered a client rather than a counterparty.[35] ESMA has dealt with the matter more recently, but only in connection with specific settings, such as the definition of systematic internalisers. These are investment firms that 'deal on own account when executing client orders' on an organised, frequent, systematic and substantial basis (Article 4(1)(20) MiFID II). In this context, ESMA is of the opinion that an investment firm is always executing orders on behalf of the client when its counterparty is not a financial institution. Otherwise, (only) one of the two parties involved (can and) shall be regarded as executing orders on behalf. This party shall be determined – either party by party or transaction by transaction – based on elements such as the identity of the firm initiating the order or executing it and on any other hint suggesting reliance of one party on the other.[36]

All in all, interpretive divergence at the supervisory level in this and other matters seems largely unavoidable, at least in the current framework where ESMA has limited direct supervisory tasks and NCAs remain crucial.[37] ESMA's powers facilitating supervisory convergence help address this problem, but can

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[30] As per Art. 4(1)(6) MiFID II, dealing on own account means .trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments'.

[31] Kitty Lieverse, 'The Scope of MiFID II' in Busch and Ferrarini (n 17), 29-30.

[32] CJEU, C-688/15, *Anisimovienė and Others (Snoras)*, 22 March 2018. For an analysis see Danny Busch, 'Self-placement, dealing on own account and the provision of investment services' (2019) 14 Capital Markets Law Journal 4.

[33] This was the interpretation by the FCA, *The Perimeter Guidance Manual* (June 2021), Q15A, available at https://www.fca.org.uk.

[34] For a broad analysis see Danny Busch, 'Agency and Principal Dealing under the Markets in Financial Instruments Directive' (2017) 25 European Review of Private Law 337.

[35] With some exceptions only for the best execution regime in case no order is executed on behalf of a client. In this case, there is a presumption that a firm is acting on behalf of a client when this latter qualifies as retail: EU Commission, *Answers to CESR scope issues under MiFID and the implementing directive* (Working Document ESC-07-2007), available at https://ec/europa/eu.

[36] ESMA, *Questions and Answers on MiFID II and MiFIR transparency topics* (ESMA70-872942901-35) (20 May 2022), Q 7.7, available at https://www.esma.europa.eu.

[37] Currently, ESMA has direct supervisory powers for credit rating agencies (Art. 15 Regulation (EC) 1060/2009 on credit rating agencies), trade repositories (Art. 55 Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories – EMIR; Art. 5 Regulation (EU) 2015/2365 on securities financing transactions – SFTR), data reporting

hardly solve it (Articles 1(5)(g) and 8(1)(b) Regulation (EU) No 1095/2010). In particular, fine-tuning of guidelines and Q&A documents may further narrow down the distance among NCA interpretations (Articles 16 and 16b), while more specific measures such as information exchange, coordination groups and peer-review exercises do not seem to have developed their full potential (Articles 29 and 30).[38] ESMA cannot replace local supervisory discretion and day-to-day tasks, as opposed to what happens in the EBU, where even for less significant banks the ECB can instruct NCAs or directly exercise powers to ensure consistent application of high supervisory standards (Article 6(5) Regulation (EU) No 1024/2013).

There is, however, a structural limit to harmonisation through supervisory convergence. This comes from the fact that neither ESMA nor NCAs, nor the European System of Financial Supervision (ESFS) taken as a whole, has the monopoly on the interpretation and enforcement of the CMU rules. This is shared with courts. Courts' role has remarkable consequences in the CMU, as private enforcement plays there a larger role compared to what happens in the EBU, where the typical setting of litigation is rather between supervised entities and supervisors. The next section further elaborates on some of these consequences.

VII. *Coordinating enforcement at public and private level*

The last source of persistent divergence within the CMU this paper purports to address is a consequence of the somewhat uneasy relationship between the CMU provisions and their enforcement that the previous sections have highlighted. While the rules that build the CMU are largely defined at the EU level, enforcement strategies often fall in the remit of Member States' sovereignty. This form of divergence is the manifestation, within the realm of CMU, of the typical allocation of powers that originates from national enforcement discretion.[39] Two examples are worth considering here. The first relates to Member States' implicit or explicit options regarding enforcement tools. The second example is peculiar to the role of private enforcement instead, and stems from the allocation of adjudicating powers to civil and commercial courts next to the sanctioning powers of NCAs.

VII.I. *Public enforcement: national discretion and coordination issues*

Some remaining areas for divergence originate from the options Member States retain in the selection of the enforcement tools at their disposal. This applies to all three traditional forms of enforcement: criminal, administrative, and private. This subsection considers the criminal/administrative divide, while the next addresses the distinction between public and private enforcement.

When punishing market abuse, Member States are bound to apply criminal sanctions to violations amounting to insider dealing, unlawful disclosure of inside information or market manipulation, at least when such violations are serious and perpetrated with intention (Articles 3, 4, and 5 Directive 2014/57/EU – Market Abuse Directive II; MAD II).[40] For the same violations, Member States may decide whether to apply an administrative sanction, as well, or leave them subject only to criminal punishment (Article 30(1) MAR).[41] For less serious violations, national discretion can instead determine the application of administrative sanctions alone.[42]

This kind of Member State discretion can determine some divergence in the enforcement tools across the CMU. Moreover, it creates uncertainties on the proper coordination of criminal and administrative sanctions

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services providers (Article 27b Regulation (EU) 600/2014 on markets in financial instruments – MiFIR) and securitisation repositories (Art. 10 Regulation (EU) 2017/2402 on securitisations). Other powers may come in the future. Among them, the supervision on external reviewers in the field of green bonds (European Commission, 'Proposal for a Regulation on European green bonds' (COM(2021) 391 final) (6 July 2021)).

[38] For a broad account of ESMA's powers see Niamh Moloney, *The Age of ESMA. Governing EU Financial Markets* (Hart 2018).

[39] Van den Brink (n 9), 239-40.

[40] Insider dealing is considered serous when it has high impact in terms of its damage to the integrity of the market, profit derived or loss avoided, level of damage caused to the market, or value of financial instruments traded (Recital 12 MAD II). Similar criteria, combined with the level of alteration of prices, apply to market manipulation (Recital 13 MAD II).

[41] Attempts also require a criminal sanction: Articles 14 and 15 MAR and Article 6 MAD II.

[42] For a positive assessment of this optional regime see ESMA, *MAR Review Report* (ESMA70-156-2391) (23 September 2020), 145, available at https://www.esma.europa.eu.

when the two coexist and the size of the administrative sanctions – as is often the case considering the limits MAR mandates – is such to qualify them as substantively criminal for the purpose of ne bis in idem. This divergence and this uncertain coordination of enforcement tools reduce legal certainty. To be sure, neither of the two drawbacks raises intractable problems, but they still prevent a smooth interaction among jurisdictions.

As to the remaining inconsistencies in the nature of the sanctions, one should consider that these differences do not seem to increase the costs of performing activities on a cross-border basis. Limited as they are to the entity of the sanction, they are not likely to determine any variations in the internal processes of investors. At the same time, national sanctions are, on paper, sufficiently dissuasive due to the level of harmonisation MAR and MAD II combined, which reduces the risk of regulatory arbitrage. However, law in action may be a different story and it may make some jurisdictions more attractive than others.

As to bis in idem, judicial interpretation, particularly by the CJEU, has proven rather effective in addressing the somewhat uneasy interaction between (formally) criminal and administrative (but substantially criminal) sanctions. Decisions taken so far have addressed many concerns regarding substantive and procedural coordination for the two types of sanctions. For instance, the CJEU has clarified – in line with the case-law of the ECtHR[43] – that res iudicata on the criminal sanction is hardly compatible with the continuation of a trial concerning the administrative (but substantially criminal) sanction for the same facts.[44] Also, joint application of the two sanctions can occur subject to strict proportionality requirements, including the predictability of the sanctioning regime as well as procedural and substantive coordination of the two tracks. This is meant to minimise the burden on the accused person through the exchange of information between the competent bodies and, respectively, by discounting the previous sanction when quantifying the second one.[45] However, some open questions remain, for instance as regards cases where the administrative sanction become subject to res iudicata before the criminal sanction.

More pressing are, however, some consequences of the CMU regimes on cross-border coordination of public enforcement. Once again, MAR provides a good case in point. To ensure effective detection and repression, the EU regime on administrative market abuse violations establishes competence upon both the NCA of the Member State where the relevant trading venue is established and the NCA of the Member State where the actions amounting to market abuse are carried out (Article 22 MAR). Concurrent jurisdiction also characterises the criminal regime, where the power to prosecute and convict lies with both the criminal authority of the Member State where the violation was perpetrated and the criminal authority of the Member State of which the accused persons are nationals (Article 10 MAD II). If this setting reduces the possibility that market abuse goes unpunished, it also raises some concerns. First, it increases the risk of conflicting interpretations by NCAs – ESMA's role in fostering supervisory convergence is key in this regard, but this is not always sufficient to ensure perfect alignment, as we have seen.[46] The problem is, to some extent, addressed for issuers, because for certain provisions that apply to listed companies MAR takes care of identifying a single NCA.[47] Unfortunately, these conflict-of-law rules do not expressly apply to all the provisions concerning issuers, and no similar attempts are made for other market participants.

Second, the identification of concurrent competencies and jurisdictions increases the risk of multiple prosecutions. Even before res iudicata makes this relevant for bis in idem, parallel investigations and proceedings may increase costs for enforcers and market participants alike. MAR seems to be mindful of the problem, but the remedies are mostly limited to information exchange among NCAs and, most importantly, to the NCAs' duty to coordinate to avoid duplications and overlaps when applying administrative sanctions to cross-border violations (Article 25 MAR; Article 31b Regulation (EU) No 1095/2010). However, no similar provision exists for coordinating administrative and criminal proceeding, or different criminal proceedings.

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[43] ECtHR (General Court), *A and B v. Norway*, (24130/11 & 29758/11) (15 November 2016).
[44] CJEU, C-596/16 and C-597/16, *Di Puma and Zecca*, 20 March 2018 (the case referred to an alleged violation of insider dealing, which led to res iudicata on an acquittal in its criminal track while the proceeding concerning the administrative track was still pending); CJEU, C-537/16, *Garlsson Real Estate and Others*, 20 March 2018 (this time referring to a criminal conviction for market manipulation preceding res iudicata in the administrative track). See also, previously, CJEU, C-45/08, *Spector Photo Group and Van Raemdonck*, 23 December 2009. See Michiel Luchtman, 'The CJEU's Recent Case Law on Ne Bis In Idem: Implications for Law Enforcement in A Shared Legal Order' (2018) 55 Common Market Law Review 1717.
[45] CJEU, *Garlsson*, n 44.
[46] See section VI above.
[47] See e.g., Art. 17(3) MAR and Art. 6 Reg. (EU) 2016/522 (identifying the NCA for the notification of a delay in the disclosure of inside information based on the issuer registered office).

Quite to the contrary, when judicial proceedings are pending (or a criminal decision was taken), NCAs may refuse to exchange information with their peers (Article 25 MAR). Avoidance of inefficiencies among criminal prosecutions and proceedings in different Member States therefore relies on generally applicable measures such as Article 50 CFR or Article 54 of the 1990 Convention implementing the Schengen Agreement of 1985, which however do not establish the criteria for such coordination. EU tools facilitating mutual legal assistance and mutual recognition in criminal matters are limited in their scope, instead, as they generally do not concern administrative sanctions and proceedings.[48] Moreover, recognition of criminal actions carried out in other Member States is mandatory only for final judgments, and is only optional for prosecutions (see e.g. Art. 3(1)(2) Framework decision 2002/584/JHA – on the European arrest warrant and Art. 13(1)(a) Framework Decision 2008/978/JHA – on the European evidence warrant). Equally unable to ensure coordination are the Framework decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (2009/948/JHA) and the Eurojust decision (2002/187/JHA).[49] As a consequence, the outcome of multiple proceedings may lead to a situation where the applicable sanction among those that may concur from different Member States is simply the one that reaches res iudicata first, following an inefficient "first-come, first-served" principle.[50]

Uneasy identification of applicable law (and of NCAs) may also hinder coordination among supervisors. For instance, the law applicable to shareholder rights defined under Directive 2007/36/EC (Shareholder Rights Directive – SHRD) is the law of the Member State in which the listed company has its registered office (Article 1(2) SHRD).[51] This connecting factor does not easily accommodate the enrolment of intermediaries which maintain securities accounts – such as central securities depositories, banks and investment firms – in the protection of shareholders (Article 2(1)(d) SHRD). Absent specific rules on this matter, the only possible reading of the SHRD is that the NCA is also to be determined based on the same connecting factor (as NCAs normally do not enforce foreign laws).[52] This makes sense as long as substantive rules on shareholder rights are at stake, because those rights follow the law of the company. However, from the point of view of the corporate action procedures, making intermediaries subject to as many laws and NCAs as are the countries of listed companies in which their clients have invested is very unlikely to deliver an efficient system, due to the risk of conflicting rules and interpretations (Articles 3a-3f SHRD). Again, ESMA coordination role will be crucial in this regard, although national courts – and possibly the CJEU – will have the final say on the identification of the NCA.

VII.II. *Private enforcement: the role of national laws, and coordination issues*

Even more complicated is the situation for private enforcement, another area where national differences persist. Once again, problems may originate not so much from those differences, but rather from the way these are handled by the law. The last area this paper considers among those where harmonisation is not complete relates to private enforcement.

The legislative acts that build the CMU tend to leave the Member States broad discretion when defining private enforcement measures, provided that equivalence and effectiveness are ensured.[53] A key element in this regard is the relationship between EU law and rules of conduct under national private law. This is an area where material divergences persist, which can be partially explained with the overall reluctance that EU law

[48] See however, for enforcement of sanctions, Council Framework Decision 2005/214/JHA, and CJEU, C-60/12, *Baláž*, 14 November 2013.

[49] See John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?', (2013) 9 Utrecht Law Review 211, 222 (the 2009 Framework decision does not contain any prioritization of jurisdiction or stringent criteria for centralized prosecutions)

[50] Matteo Gargantini, 'Public Enforcement of Market Abuse Bans. The ECtHR Grande Stevens Decision' (2015) 1 Journal of Financial Regulation 149.

[51] Different criteria apply to institutional investors, asset managers, and proxy advisors.

[52] Alessio Bartolacelli et al, 'Article 14a and 14b: Enforcement of SRD II Provisions' in Hanne Birkmose and Konstantinos Sergakis, The Shareholder Rights Directive II (Edward Elgar 2021), § 13.16-17

[53] On MiFID I see CJEU, C-604/11, *Genil*, 30 May 2013, § 57 (principles of equivalence and effectiveness bind Member States in the determination of private law consequences of violations).

and the CJEU case law have shown in deriving implied rights with horizontal effects in the field of financial law.[54] Some of the persisting divergences are addressed below using MiFID II as an example.[55]

Overall, MiFID II has strengthened the role of private enforcement by mandating compensation or other remedial actions for financial losses or damages resulting from infringement of MIFID II provisions (article 69(2) MiFID II).[56] Nonetheless, a distance remains between Member States where violation of MiFID II rules automatically ensures redress and Member States where this is not the case. In the first group of countries, provisions implementing MiFID II are often regarded as directly or indirectly part of the contractual rules that bind investment firms.[57] In the second group, the distinction between public law and private law is more important, and public law infringements may not be sufficient to ground redress without an autonomous civil law claim.[58]

The variance is even broader than this general distinction would suggest, as within the same country the availability of private enforcement for MiFID II violations may depend on the specific rule at stake and/or on the nature of the claimant. Sometimes, in fact, civil liability may arise from the breach of MiFID II detailed conduct-of-business rules, but not for violations of general provisions such as those mentioned in section V. In Member States following this model – which has been labelled as 'substitution model'[59] – general provisions are not deemed specific enough to autonomously ground redress.[60] In other cases, restrictions to private enforcement may rather depend on the nature of the claimant. The UK provided an interesting example in this regard, as private enforcement for certain violations of conduct-of-business rules was automatically granted only to individuals and to legal entities not suffering the relevant loss in the course of their business.[61] Even after Brexit, the example continues showing that different models of private enforcement are compatible with EU law.

To be sure, not all the differences in the private enforcement framework create the risk of regulatory arbitration, as the level of investor protection may not be that different in practice.[62] Furthermore, some inconsistencies seem unavoidable at the moment, considering that perfect homogeneity would require more pervasive harmonisation of general contractual law principles. Once again, problems rather seem to arise where the same market participant may become subject to different, and possibly conflicting, interpretations.[63]

This can easily occur with the interpretation of general provisions, which inevitably lend themselves to divergent readings. For instance, general standards of care have been interpreted by civil and commercial

[54] For an analysis see Takis Tridimas, 'Financial regulation and privale law remedies: an EU law perspective' in Olha Cherednychenko and Mads Andenas, *Financial egulation and Civil Liability in European Law* (Edward Elgar 2020), 47.
[55] For a broader analysis see Federico Della Negra, *MiFID II and Private Law: Enforcing EU Conduct of Business Rules*, (Hart 2018).
[56] This may be understood as a specification of the general principle of effectiveness, as scholars reached the same conclusion under the previous regime as well: Michel Tison, 'The civil law effects of MiFID in a comparative law perspective' in Stefan Grundmann et al (eds), *Unternehmen, Markt und Verantwortung: Festschrift für Klaus J. Hopt zum 70. Geburtstag* (De Gruyter 2010), 2621, 2624. On the new rule see Tridimas (n 54), 68-9.
[57] This is the case, among the others, with France, Spain and Italy (see Thierry Bonneau, 'France', 114; Manuel Ángel López Sánchez et al, 'Spain', 177; Filippo Rossi and Marco Garavelli, 'Italy', 139-40, all in Danny Busch and Cees van Dam (eds), *A Bank's Duty of Care* (Hart 2017)).
[58] This is the case, among the others, with Germany and, to a lesser extent, the Netherlands (see respectively Jens-Hinrich Binder, 'Germany', 72-4, and Danny Busch et al, 'Netherlands', 209, both in Busch and van Dam (eds), n 57). It is however questionable that the public nature of MiFID II provisions can lead to exclude implied rights that allow private remedies (Tridimas (n 54), 63).
[59] Olha Cherednychenko, 'Public Regulation, Contract Law, and the Protection of the Weaker Party: Some Lessons from the Field of Financial Services' (2014) European Review of Private Law 663, 671.
[60] Peter Mülbert, 'The Eclipse of Contract Law in the Investment Firm-Client-Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective' in Guido Ferrarini and Eddy Wymeersch (eds), *Investor Protection in Europe* (OUP 2006), 308 (Art. 19(1) MiFID I was not further detailed by level 2 provisions and could not justify integration of disclosure duties set forth by dir. 2006/73/EC).
[61] Art. 138D Financial Services and Markets Act 2000. See Tison (n 56), 2631; Cherednychenko (n 59), 670. For an application see *Grant Estates Limited (in liquidation) and Others v The Royal Bank of Scotland plc and Others* [2012] CSOH 133, 21 August 2012, §§ 31-48 (critically Busch n 34).
[62] Danny Busch, Why MiFID matters to private law – the example of MiFID's impact on asset manager's civil liability, (2012) 7 Capital Markets Law Journal 386, 398-9; for a comparative analysis see Tison (n 56), 2624 and 2630-2.
[63] Tison (n 56), 2633; Mülbert (n 60), 318-9 (both submitting that national court should refrain from applying local private law when assessing cross-border free provision of financial services rules).

courts to hold intermediaries liable under information duties that were stricter than those defined under EU law, particularly by mandating disclosure on the specific financial instruments even when EU law referred, more generically, to the type of financial instruments.[64] Along the same line, some national courts have deemed investment firms bound to share information concerning the probabilistic scenarios they have used to determine the fair value of complex financial instruments such as interest rate swaps.[65]

Another case in point are the different understandings that surround the boundaries of dealing on own account, as well as the consequences this determines on the application of MiFID II provisions (as highlighted in section VI).[66] More in general, civil and commercial courts may interpret the boundaries between transactional and fiduciary-based services (section V) on the basis of national private law principles, which do not necessarily coincide with those set forth in MiFID II.[67]

These differences may reduce legal certainty and hamper financial markets' integration within the CMU. Imagine an investment firm from a Member State (A) that provides online investment services in another Member State (B), with no establishment in the territory of this latter. In this case, the NCA of Member State A is entrusted with public enforcement (Article 34 MiFID II). Applicable private law depends, instead, on the nature of the service recipient. If that client qualifies as a consumer, the client's domicile determines the applicable law (Article 6 Regulation (EC) No 593/2008 – Rome I; Article 12 Regulation (EC) No 864/2007 – Rome II, for contractual and pre-contractual claims,[68] respectively). For professional clients, the home country of the investment firm drives the selection of applicable law instead (Article 4(1)(b) Rome I; Article 12 Rome II, for contractual and pre-contractual claims, respectively).[69] As for jurisdiction on contractual claims, consumers have the power to decide whether to establish a proceeding in their country or in the country of origin of the investment firms. Professionals have to bring action before the court of the place of provision of the service, instead, which may not be easy to identify for online services (Articles 7(1) and 17 Regulation (EU) No 1215/2012 – Brussels I-bis).[70] Should the claim qualify as tortious due to its pre-contractual nature,[71] identifying jurisdiction would be even more difficult, as the place where the damage occurred[72] is hard to identify, as the intricated case law of the CJEU on the localisation of financial damages demonstrates (Article 7(2) Brussels I-bis).[73]

In all the circumstances above that lead to a situation where the applicable law, the competent court of jurisdiction or the NCA are in different Member States, market participants such as investment firms may be

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[64] Mülbert (n 60), 317; Binder, Germany (n 58), 74-5; Busch (n 62), 396.

[65] Luca Enriques and Matteo Gargantini, 'The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case' (2017) 3 Italian Law Journal 485.

[66] For France see Bonneau (n 57), 131.

[67] For Germany see Binder (n 58), 68.

[68] Pre-contractual claims may originate from breach of disclosure duties (Recital 30 Rome II). In some countries, civil claims based on MiFID II violations may qualify as tortious based on the public law nature of national implementing measures and the connected contravention of a statutory duty (for the Netherlands see Busch et al (n 58), 209).

[69] Note that the notion of 'retail client' in financial law (Art. 4(1)(11) MiFID II) and the notion of consumer in EU private international law do not coincide, which adds further complexity to the system (CJEU, C-208/18, *Petruchová*, 3 Ocotber 2019; CJEU, C-500/18, *Reliantco Investment and Reliantco Investment Limassol Sucursala Bucureşti*, 2 April 2020]

[70] Peter Mankowski, 'Article 7' in Ulrich Magnus and Peter Mankowsi (ed), *Brussels Ibis Regulation – Commentary* (Otto Schmidt 2015), 238-40.

[71] Whether pre-contractual liability is tortious under Art. 7 Brussels I-bis is debated and may depend on the circumstances of the case (see Mankowski (n 70), 182-3, 273, 313-4). In any event, the uncertainties on the location of financial damages affect areas where the qualification of the claim as tortious is undisputed, as for prospectus liability (see n 73 below for references).

[72] This is the connecting factor that is most often invoked by claimants as the place where the harmful event occurred, the alternative being the place where the wrongful conduct took place (CJEU, 21-76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, 30 November 1976).

[73] CJEU, C-168/02, *Kronhofer*, 10 June 2004; CJEU, C-375/13, *Kolassa*, 28 January 2015; CJEU, C-12/15, *Universal Music International Holding*, 16 June 2016; CJEU, C-304/17, *Löber*, 12 September 2018; CJEU, C-709/19, *Vereniging van Effectenbezitters*, 12 May 2021. For an analysis see Francisco Garcimartín, 'The Law Applicable to Prospectus Liability in the European Union' (2011) 5 Law and Financial Markets Review 449; Matthias Haentjens and Dorine Verheij, 'Finding Nemo: Locating Financial Losses after Kolassa/Barclays Bank and Profit' (2016) 31 Journal of International Banking Law and Regulation 346; Matthias Lehmann, 'Private international law and finance: nothing special?' [2018] Nederlands Internationaal Privaatrecht 1; Matteo Gargantini, 'Prospectus Liability. Competent Courts of Jurisdiction and Applicable Law' in Danny Busch et al, *Prospectus Regulation and Prospectus Liability* (OUP 2020), 441.

subject to inconsistent interpretations, which obviously reduces the ability of the CMU to deliver a truly integrated regulatory environment.

VIII. *Dealing with harmonisation's limits: from divergence to diversity*

As the previous sections have demonstrated, the CMU has delivered a much more homogeneous regulatory and supervisory framework for capital market in the EU. At the same time, divergences remain at the regulatory and supervisory level as well as, more in general, in the enforcement practices. Reducing some of the remaining distance among national systems is certainly possible, and the Commission has recently shown its commitment to strengthening harmonisation and supervisory convergence – as required under Action 16 of the CMU Action Plan.[74]

However, there are limits to what harmonisation of EU law can achieve, at least for the time being. Among the sources of variance this analysis has shown, two seem particularly thorny. The first one is the lack of a centralised supervisor for the CMU, as opposed to the EBU. The second one is the role of national courts in private enforcement. The next subsections will consider these factors separately. Overall, the approach taken will start from the assumption that in both cases – and especially for national civil and commercial courts – lack of centralisation is a limit to perfect harmonisation of interpretation.

To be sure, national variation is not necessarily bad. As local enforcement is part of the CMU picture, diversity is needed to a certain degree to make sure CMU provisions can be enforced. In this regard, some remaining differences should be welcome due to their ability to accommodate national specificities. Moreover, even if one believes that those differences are an obstacle to a perfectly integrated CMU, some variance in the application of EU financial law is here to stay. What then becomes crucial is, rather, to make sure that this variance is properly managed to reduce legal risks for market participants, at least until centralisation of public (and, less likely, private) enforcement occurs. In this regard, conflict-of-law rules would deserve more attention from policymakers than is the case today and should be addressed more systematically for both the identification of NCAs and for private enforcement (including applicable law and jurisdiction).

VIII.I. *Does the CMU need a single supervisor?*

As supervisory divergence originates from the existence of multiple NCAs, a logical way to approach the problem would be to concentrate supervisory powers in a single centralised entity. Expanding ESMA direct supervisory powers beyond the existing ones may be the most immediate way to do that. For feasibility reasons, this centralisation process may also selectively involve certain regulated areas, at least initially, as also envisaged by Action 16 of the new CMU Action Plan.[75]

For instance, in the field of prospectus approval, scholars have submitted that completion of the CMU would require the creation of a fully-fledged European Listing Authority for the entire European Union.[76] This central authority would, to some extent, replicate the functioning of the Single Supervisory Mechanism (SSM), which serves as the backbone of the EBU. In line with this term of comparison, also the European Listing Authority would be competent for larger issuers, while the approval of prospectuses concerning smaller companies would remain in the NCAs' remit.[77] In this manner, the European capital markets would retain some room for forum shopping and supervisory competition. For larger issuers, this proposal would also eliminate the bureaucratic costs of prospectus notification, which is today a precondition for accessing the European passport (Art. 25 and 26 Prospectus Regulation). It would also deliver higher economies of scale, hence potentially reducing the direct and indirect costs of supervision. To some extent, this would also match

[74] See European Commission (n 24), 35.
[75] For the existing powers see supra section VI. See also European Commission (n 24), 29 (asking stakeholders to identify areas where direct supervision should be considered).
[76] A reasoned and detailed proposal in this sense can be found in Emilios Avgouleas and Guido Ferrarini, 'A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA. Costs, Benefits, and Legal Impediments' in Danny Busch et al (eds), *Capital Markets Union in Europe* (Oxford: 2018), 55.
[77] Ibid, 58-9 and 68.

the centralisation of regulatory powers with the centralisation of supervisory powers, thus reflecting a tendency to have spillover effects between the two.[78]

The European Commission took a step towards the centralisation of prospectus approval in its proposal for a reform of the three European Supervisory Authorities (ESAs).[79] This initiative devised the conferral upon ESMA of the power to approve certain prospectuses for which centralisation was justified, in the Commission's opinion, by a cross-border dimension within the Union, by a particular level of technical complexity, or by the potential risks of regulatory arbitrage. These were prospectuses for the admission to trading of wholesale non-equity securities on a regulated market accessible only to qualified investors, prospectuses relating to specific types of complex securities, such as asset-backed securities, or to specific types of issuers, such as property companies, mineral companies, scientific research-based companies, shipping companies and, remarkably, third-country issuers. However, due to a lack of political agreement, these proposals did not remain in the reform package that was subsequently approved.[80]

The Commission's unsuccessful attempt shows that the time might not be yet ripe for centralisation of supervision in critical areas such as prospectus approval, and this conclusion may be extended to other areas such as investment services and trading venues. This may be due to prevailing national resistances, but it is also true that the immediate establishment of a single competent authority would prevent market participants, including investors, from continuing to rely on those NCAs that have demonstrated to be perfectly able to meet their needs. Whatever the reasons for the obstacles on the road towards a European Securities and Exchange Commission, another approach that might deserve consideration – either as such or as an intermediate step towards further top-down supervisory centralisation – is therefore the conferral on ESMA of supervisory powers, but with no exclusive competence on them.[81] In other words, ESMA could qualify as an additional 28th competent authority, to which market participants could refer to as an alternative to their NCA.[82] Such an approach would, of course, have its own flaws, including the cost of duplicating supervisory structures, and it might equally face some resistance.[83] However, it should be politically more palatable than the immediate creation of a European Securities and Exchange Commission. Adding ESMA as an additional central authority would avoid the risk of petrification that may accompany the creation of a competent authority with monopolistic power and would allow making the big step towards a single European authority – if this is deemed appropriate – only after testing its success among issuers and investors. This form of competition would also not suffer from a higher risk of a race to the bottom than the current system does, as ESMA would surely not indulge in any contest to attract issuers at the expense of prospectus quality and would likely have an eye on unfair practice by its competitors.

VIII.II. *Fixing conflict-of-law rules*

Multiple NCAs will likely characterise the regulatory framework for the CMU in the years to come, at least until a systemic crisis or a major financial scandal create a policy window that fosters reforms.[84] Moreover, even with a centralised Securities and Exchange Commission, national courts will retain jurisdiction on private enforcement, with the implications highlighted in section VII.II. Both points contribute to making conflict-of-

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[78] Miroslava Scholten and Daniel Scholten, 'From regulation to enforcement in the EU policy cycle: a new type of functional spillover?' (2017) 55 Journal of Common Market Studies 925.

[79] European Commission, *Proposal for a Regulation of the European Parliament and of the Council* (COM(2017) 536 final) (20 September 2017) (see Art. 9(10)).

[80] See the Texts Adopted by the European Parliament on 19 April 2019.

[81] See, with regard to prospectus approval, Carmine Di Noia and Matteo Gargantini, 'The Approval of Prospectus. Competent Authorities, Notifications, and Sanctions' in Busch et al (eds) (n 73), 359.

[82] The proposal to create an additional European regime that provides a further option for market participants, without replacing the existing national system, is not unprecedented. In the field of crowdfunding see European Commission, *Proposal for a Regulation of the European Parliament and of the council on European Crowdfunding Service Providers (ESSP) for Business* (COM(2018) 113 final) (8 March 2018).

[83] To be sure, the Commission's proposal on Crowdfunding (n 82) had no better fortune than that on centralization of prospectus approval within the ESAs reform (n 79), when it comes to the role of ESMA (see European Parliament, *Legislative resolution on the proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business* (COM(2018)0113 – C8-0103/2018 – 2018/0048(COD)) (27 March 2019).

[84] On policy windows see John Kingdon, *Agendas, Alternatives, and Public Policies* (Little Brown 1984).

law rules a salient factor in delivering a coherent regulatory framework for the CMU even when this accommodates some level of diversity.

A general review of the connecting factors may be advisable, in the first place, for NCAs. In some areas, current provisions do not seem to reflect thorough consideration of their implication in terms of legal certainty and costs. This is the case, for instance, with shareholder rights, as section VII.I has shown. In other areas, providing market participants with some broader choice may leverage negative harmonisation to deliver a de facto more integrated CMU. Increased legal mobility of market participants would, in fact, facilitate the concentration of supervision in some financial centres, even after Brexit. Even if this goes often unnoticed, European capital markets are already enjoying some centralisation when the connecting factors enable sufficient freedom to choose the preferred NCA. For instance, a particularly flexible regime applies to prospectus approval of non-equity securities. A look at the ESMA data on the number of prospectuses that are approved and passported, combined with the type of securities they concern, demonstrates the point.[85] In particular, the NCAs of Luxembourg, Ireland and Germany seem to have a consolidated role as European hubs for the approval of prospectuses on, respectively, debt securities, asset-backed securities and derivatives, sometimes sharing the role among them.[86] Unsurprisingly, no such centralisation seems to exist for equity securities, due to the current regime for the identification of NCAs.[87] The role of Luxembourg and Ireland for UCITS funds and AIFs confirms the point.[88]

To be sure, it remains uncertain whether broadening competition among NCAs would determine a race to the top or a race to the bottom. A complete analysis would be out of the scope of this paper,[89] but within the CMU the risks of suboptimal outcomes in a more competitive context are greatly reduced by ESMA's powers of intervention, at least in case of blatant violations of the rules on prospectus approval.[90] After all, this concern might equally apply to the very idea of regulatory passports, which is already one of the backbones of the CMU.

In the second place, private enforcement should be able to rely on a clear framework for the identification of the applicable law and the competent court of jurisdiction. Currently, the CMU falls short of delivering this result, mainly because the pertinent rules – whether in the Rome I, Rome II, or Brussels I-bis Regulations – were devised without bearing in mind the specific problems of the provision of financial services and of the localisation of financial damages. As a result, conflict-of-law rules are not a sufficiently reliable source for a predictable legal environment in the CMU. Scholars have submitted several alternative proposals to fix the status quo. These include almost all the possible connecting factors one can imagine, such as bank accounts, securities accounts, central securities depositories, trading venues, and others, sometimes in combination among them. An assessment of the relative merits of these proposals cannot even be attempted here,[91] but what matters is, after all, to avoid ending up like the proverbial Buridan's ass in the lack of a shared view on the best solution, where any of the alternatives that have been submitted would improve the current regime.

IX. *Conclusion*

One of the essential components of the CMU is the creation of a single rulebook that ensures a high level of harmonisation of capital markets law in the EU. In this context, differences among national legal systems may help the common legal framework accommodate for local specificities, but also require proper

[85] See ESMA, *Report – EEA prospectus activity in 2017* (ESMA31-62-111) (15 October 2018), 9-13.

[86] The analysis is inevitably approximate, based as it is on the numbers of prospectus rather than on the total value of the securities they accompany.

[87] On the determinants for the creation of competitive financial centers see in general Thomas Gehrig, 'Location of and Competition between Financial Centers' in Xavier Freixas et al (eds), *Handbook of European Financial Markets and Institutions* (OUP 2008), 619.

[88] ESMA, *Performance and Costs of EU Retail Investment Products. Annual Statistical Report* (ESMA50-165-1677) (5 April 2022), 9, available at https://www.esma.europa.eu (for UCITS funds); Id., *EU Alternative Investment Funds. Annual Statistical Report* (ESMA50-165-1948) (3 February 2022), 28, available at https://www.esma.europa.eu (for hedge funds).

[89] See Luca Enriques and Tobias Tröger, 'Issuer Choice in Europe' (2008) 67 Cambridge Law Journal 521.

[90] See Carmine Di Noia and Matteo Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the CJEU Decision on the Short Selling Regulation (Case C-270/12)' (2014) 15 European Business Organization Law Review 1.

[91] See n 73 for a short selection of sources.

coordination measures. This paper has analysed several remaining differences among national systems in the context of the CMU, and has classified them based on their causes. For instance, minimum harmonisation is still among the sources of national variations, and the room for more restrictive measures at the national level is often uncertain. While minimum harmonisation is a declining feature of EU financial law, some national diversity will likely remain due to the use, in EU law, of general provisions that NCAs and national courts can interpret in different ways, in light of their legal traditions. On top of this, national private laws will continue to influence the interpretation of EU law, of national provisions implementing it, and of private enforcement more in general.

These and other differences are here to stay and are, to some extent, a necessary evil to make the CMU work. After all, the CMU would hardly be able to accomplish its objectives without the cooperation of national public and private enforcement systems, and these systems need to retain their ability to translate EU law into local implementation and enforcement. As the paper has shown, the difference between the negative impact of divergence and the positive consequences of diversity in the CMU depends on the way the remaining differences are addressed. In this regard, more attention should be paid to conflict-of-law rules, as market participants are still subject to the risk of regulatory uncertainty and conflicting interpretations.